April 13, 2005

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Myth vs. Fact:
Myth: Filibusters Of Judicial Nominations Are Part Of Senate Tradition.

Fact: Having to Overcome A Filibuster (Or Obtaining 60 Votes) on Judicial Nominees Is Unprecedented And Has Never Been The Confirmation Test For A Nominee – And In The Past, Even Democrats Have Called For Up Or Down Votes.

They Said It:
"If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty." — Senator Patrick Leahy, *Congressional Record*, June 18, 1998.

"I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a [floor] vote, up or down, within 60 days." Senator Patrick Leahy, *Congressional Record*, October 11, 2000.

"As Chief Justice Rehnquist has recognized: 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' An up-or-down vote, that is all we ask for [Clinton judicial

nominees] Berzon and Paez." — Former Senator Tom Daschle, *Congressional Record*, October 5, 1999.

"But I also respectfully suggest that everyone who is nominated ought to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor. . . . It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote . . . ." — Senator Joe Biden, *Congressional Record*, March 19, 1997.

"The Chief Justice of the United States Supreme Court said: 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' Which is exactly what I would like." — Senator Ted Kennedy, *Congressional Record*, March 7, 2000.

"We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. But give them a vote." — Senator Ted Kennedy, *Congressional Record*, February 3, 1998.

"A nominee is entitled to a vote. Vote them up; vote them down." — Senator Diane Feinstein, *Congressional Record*, September 16, 1999.

Statement of Senator Saxby Chambliss
April 13, 2005

Mr. President: Let me start by noting again that never before in the history of the United States Senate has a minority of 41 Senators held up confirmation of a judicial nominee where a majority of Senators have expressed their support for that nominee. For this reason, if given the opportunity, I will vote in favor of changing our rules to allow confirmation of a judicial nominee by a simple majority because, under the Constitution of the United States, the Senate is required to give its *advice* to the President on his judicial nominees.

The Senate can say "no" in regard to a particular nominee, but to do so we need an up-or-down vote to decide what advice we give the President. Failing to answer the question is shirking our constitutional role in the separation-of-powers scheme.

The Constitution spells out in certain areas, like passage of constitutional amendments and ratification of treaties, where more than a simple majority of senators is required; confirmation of judges is not one of these areas. The Senate rules have changed on several occasions over the years as to whether, and in what circumstances, a filibuster is allowed. But we've unfortunately come to a point in time where the filibuster is being abused to hold up judicial nominees on which we are required to act – that is, to say "yes" or "no" – and I believe it's in violation of the Constitution.

<u>The Eleventh Circuit</u>

Democrats have held up confirmation of the only nominee President Bush has made to the Eleventh Circuit Court of Appeals, which handles federal appeals in my home State of Georgia, as well as Alabama and Florida. As a result, on February 20th of

last year, President Bush exercised his constitutional authority to make a recess appointment of Judge Bill Pryor, the former Attorney General of the State of Alabama. This recess appointment is temporary in nature, but President Bush has renominated Judge Pryor in the 109th Congress for a permanent position on the Eleventh Circuit Court of Appeals.

As a former member of the Senate Judiciary Committee, I know that we need to review with great care the qualifications of judicial nominees to ensure that they have established a record of professional competence, integrity, and the proper temperament for judicial service. I intend to vote for confirmation of Judge Pryor's nomination to the Eleventh Circuit for the following reasons.

Since his recess appointment, Judge Pryor has gained the respect of his colleagues on the Eleventh Circuit without regard to political persuasions.

This is no surprise to me, because Judge Pryor is a tremendously selfless public servant who has worked very hard to help others both within and outside the scope of his official duties. In private life, he established a program called Mentor Alabama, which provides adult role models for at-risk children, and he has personally acted as such a mentor.

In his service as Attorney General for the State of Alabama, Bill Pryor established a record of evenhanded enforcement of the law. A noteworthy example of his fair-minded treatment of his public duties is his enforcement of Alabama's abortion laws. Attorney General Pryor is personally opposed to abortion based on his deeply held faith as a Roman Catholic. However, in 1997 the Alabama legislature enacted a ban on partial birth abortion that did not comport with the Supreme Court's decision in *Planned Parenthood v. Casey*.

The Alabama statute prohibited abortions prior to, as well as following, viability of the fetus. Attorney General Pryor ordered law-enforcement officials to enforce the law only insofar as it was consistent with the Supreme Court's precedents, which encompassed only post-viability situations. In so doing, he adopted the narrowest possible construction of the Alabama statute.

Moreover, in the wake of September 11, 2001, many abortion clinics were receiving letters with threats of anthrax exposure. In response, Attorney General Pryor held a press conference in which he asserted that Alabama law "provides stern felony penalties for those who now prey upon the public anxiety over fears of anthrax and other potential dangers. We warn anyone who is tempted to do so that their deeds are not a joke and will not be treated as mild misbehavior, but as a despicable crime against their fellow citizens that will not be tolerated." At this crucial time in history, Bill Pryor's statement sent a clear message that anthrax threats against abortion clinics would be prosecuted vigorously.

Despite his personal religious convictions, Bill Pryor has a keen knowledge of the Constitution's requirement that the government "make no law respecting the establishment of religion, or prohibiting the free exercise thereof." In *Chandler v.*

Siegleman, as Attorney General, he persuaded the Eleventh Circuit to vacate a district court injunction that prohibited student-initiated prayers in school. Acknowledging the constitutional distinction between student-led prayers and teacher-led prayers, Bill Pryor refused to argue on appeal in favor of the constitutionality of teacher-led prayers, as was the position of then-Alabama Governor Fob James. In addition, General Pryor rejected Governor James's suggestion that the State of Alabama argue that the First Amendment was never incorporated by the Fourteenth Amendment, and thus does not apply to the States.

In sum, Bill Pryor has established an impressive record as a fair, diligent, and competent public servant. His nomination to the Eleventh Circuit enjoys strong bipartisan support in his home State of Alabama, and in my home State, our Attorney General, the Honorable Thurbert Baker, a Democrat, has written in support of Bill Pryor's nomination. I urge my Democratic colleagues to stop holding up the confirmation of President Bush's only nominee to the Eleventh Circuit by voting to move forward with Judge Pryor's nomination when it comes to the floor.

The Ninth Circuit

Opposition to some of President Bush's nominees in other areas of the country, such as the Ninth Circuit, strikes me as odd because it directly contradicts what some Democrats have said in the past about the concept of balance on the courts. My friend from the other side of the aisle, the Senior Senator from New York, acknowledged a couple of years ago in a speech on the floor of the Senate that the Ninth Circuit was "by far the most liberal court in the country." (Mar. 13, 2003) Moreover, Senator Schumer stated, and I quote:

I believe there has to be balance, balance on the courts. And I have said this many times, but there is nothing wrong with a Justice Scalia on the court if he is balanced by a Justice Marshall. I wouldn't want five Scalias, but one might make a good and interesting and thoughtful court with one Brennan. A Rehnquist should be balanced by a Marshall.

Four of President Bush's nominees to the Ninth Circuit – Richard Clifton, Jay Bybee, Consuelo Callahan, and Carlos Bea – have been confirmed and are now sitting on the Ninth Circuit. That's the good news.

But Democrats are refusing to give an up-or-down vote to 2 of President Bush's nominees to the Ninth Circuit, or one-third of the judges that he's nominated. When you consider that 14 out of the 26 active, sitting judges on the Ninth Circuit Court of Appeals were appointed by President Clinton (2 of them confirmed in the last year of his presidency), the Judiciary Committee and the Senate in general treated President Clinton pretty fairly with respect to the Ninth Circuit.

Moreover, of the 28 total seats on the Ninth Circuit, 17 were Democratic nominees: 14 by President Clinton and 3 by President Carter. We now have 2 remaining seats on the Ninth Circuit to fill, and we have 2 nominees from President Bush to fill these seats. The fairness that the Senate showed President Clinton's nominees has not

been applied to all of President Bush's nominees, as the 2 pending nominees, Carolyn Kuhl, and Bill Myers, are now being filibustered despite their tremendous qualifications.

President Clinton had 8 years in office and was able to put over half of the active judges on the Ninth Circuit Court of Appeals; I might add that some of these *active* judges turned out to be *activist* judges. But with due respect to my colleagues on the other side, it's time to balance out 17 Clinton and Carter nominees with two qualified individuals like Caroline Kuhl and Bill Myers. That's the kind of balance that we need on the Ninth Circuit.

Outrageous Decisions

One of the reasons the Ninth Circuit needs some balance is the outrageous nature of some of the decisions coming from that bench. For example, in the 1996-1997 term, Judge Reinhart, a Carter appointee, was overturned 6 times in cases where he was the author of the majority opinion. To cite specific examples of outrageous cases of judicial activism, the Ninth Circuit Court of Appeals has

Barred children in public schools from voluntarily reciting the Pledge of Allegiance (*Newdow v. U.S. Congress*, 292 F.3d 597 (2002));

Initially barred California from holding a gubernatorial recall election, notwithstanding a clear state statutory scheme and widespread popular support (*Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (2003));

Invented a constitutional right to commit suicide (*Compassion in Dying v. Glucksberg*, 79 F.3d 790 (1996));

Made it far more difficult to prosecute those who give material support to foreign terrorist organizations (*Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382 (2003));

Struck down California's three-strikes criminal sentencing law (*Andrade v. California*, 270 F.3d 473 (2001)), and only implemented the Supreme Court's reversal of that decision by a divided panel (with Judge Reinhardt upholding the defendant's sentence only under Supreme Court "compulsion," and Judge Pregerson stating that "in good conscience" he could not follow the Supreme Court's decision); and

Held that a foreign-national criminal apprehended abroad pursuant to a legally valid indictment was entitled to sue the U.S. government for money damages (*Alvarez-Machain v. United States*, 331 F.3d 604 (2003)).

I could go on and on, but it's no small wonder then, that even Senator Schumer has stated that "The Ninth Circuit is by far the most liberal court in the country." (Mar. 13, 2003) Unless this is the kind of activist court that Democrats want to preserve, it's time to at least allow an up-or-down vote on nominees like Carolyn Kuhl and Bill Myers to restore some balance.

There have been two issues that have been raised by the other side during the debate and the filibuster by the other side of the aisle relative to the judicial nominees sent up by the President. One of those is the fact that filibustering Federal judges is not something that is new, and it is a contention of the other side of the aisle that Republicans initiated a filibuster on the nomination of Judge Abe Fortas back in the Johnson administration. I will once again set the record straight relative to exactly what happened, and I will quote because I want to make sure that we get this exactly right. This is from a statement made by the former Chairman of the Judiciary Committee, Senator Orrin Hatch, in some remarks that were made on the Senate floor on March 1, 2005. Senator Hatch stated as follows:

"Some have said that the Abe Fortas nomination for Chief Justice was filibustered. Hardly. I thought it was, too, until I was corrected by the man who led the fight against Abe Fortas, Senator Robert Griffin of Michigan, who then was the floor leader for the Republican side and, frankly, the Democratic side because the vote against Justice Fortas, preventing him from being Chief Justice, was a bipartisan vote, a vote with a hefty number of Democrats voting against him as well. Former Senator Griffin told me and our whole caucus there never was a real filibuster because a majority would have beaten Justice Fortas outright. Lyndon Johnson, knowing that Justice Fortas was going to be beaten, withdrew the nomination. So that was not a filibuster. There had never been a tradition of filibustering majority-supported judicial nominees on the floor of the Senate until President Bush became president."

I think that factual statement by Senator Hatch says it all relative to any issue concerning the contention that this is not the first time we have seen filibusters on the floor of the Senate. As we move into the consideration of these judges for confirmation, I am not sure what is going to come from the other side.

I have great respect, first of all, for this institution in which we serve. I am very humbled by the fact, as is every one of the 100 Senators here, that our respective states have seen fit to send us here to represent them. But as I traveled around the country last year, campaigning for President Bush, as well as for Senate nominees, I continuously heard from individuals - -whether it was in an informal gathering such as, on a lot of occasions, being in airports, or sometimes even walking down the street - - it was unbelievable the number of Americans, and I emphasize that these were not Republicans or Democrats in every instance, they were just Americans who were very much concerned about what is happening with respect to the judicial nominees on the floor of the Senate.

This body has a number of rules which have been in place for decades. Those are good and valid rules and need to be followed in most instances. But there comes a time when you have to look the American people in the eye and say: I know Americans sent a majority party to the Senate, and I know you want us to carry out the will of the American people, but, unfortunately, even though it only takes 51 votes to confirm one of Presidents Bush's judicial nominees, we have a Senate rule that says you have to have 60 votes before you get to the point where you only have 51 votes. It doesn't take a Philadelphia lawyer to figure out something is wrong with that rule, and it needs to be corrected.

As we move into the consideration of these judges, I hope we will reach an accord so that the integrity of this institution will be maintained. Hopefully, our rules can be maintained intact. But it is imperative we do the will of the American people, which is move towards the confirmation of the President's judicial nominees as required by the Constitution of the United States.

I yield the floor.

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Floor Statement of Senator Allen
4/13/05

Mr. President, I rise to share with my colleagues my observations and urgings on two issues: One, following on the eloquent remarks of the Senator from Goergia, Saxby Chambliss, on the importance of judges and actions in the Senate; and the second has to do with our National Guard and Reserves who are being called up for duty and what the Federal Government can do to be helpful to them.

Judges

First, on judges, I look at four pillars as being essential for a free and just society: freedom of religion, freedom of expression, private ownership of property, and fourth, the rule of law. The rule of law is where the judges come in, where you have fair adjudication of disputes, as well as the protection of our God-given rights.

It is absolutely essential we have judges on the bench at the Federal level, and at all levels, who understand their role is to adjudicate disputes, to apply the facts and evidence of the case to the laws, laws made by elected Representatives. We are a representative democracy. That means the judges ought to apply the law, not invent the law, not serve as a super legislature, not to use their own opinions as to what the law should be but rather apply it. That is absolutely essential for the rule of law, for the credibility and stability one would want to be able to rely on in our representative democracy for investments and, as we advance freedom, to try to have the people of other countries around the world put into place these four pillars of a free and just society.

What we have seen is a break of precedent in the Senate. For 200 years judicial nominees from the President, when they were put forward, were examined by the Judiciary Committee very closely, as they should be, as to their temperament, philosophy, and scholarship. If they received a favorable recommendation from the committee, they would come to the floor and Senators would vote for them or against them. In the last 2 or 3 years, what we have seen is unprecedented obstruction, a requirement, in effect, of a 60-vote margin for judges, particularly at the appellate level. The most egregious in recent years, in my view, was Miguel Estrada. He is an outstanding individual, completely qualified – great scholarship, great experience – a modern-day Horatio Alger story, having come to this country from Central America, applying himself, doing well. Indeed, the American Bar Association unanimously gave him their highest recommendation and endorsement.

That went on for a year. Then it went on for another year. It went on for over 2 years, and he finally had to withdraw, notwithstanding the fact that a vast majority of Senators were actually for Miguel Estrada.

It is not unique to him. It has happened to roughly ten or so appellate judges, including those nominated for the Ninth Circuit, which is the circuit where you have adventurous, activist judges who ignore the will of the people. For example, the recitation of the Pledge of Allegiance in schools, which they struck down because they are concerned about the words "under God." That is the sort of activist judiciary that is ignoring the will of the people, who are the owners of this government.

People say: What do we need to do, and they up come with this term, "nuclear option." It is a constitutional option. It shows how out of touch people are in calling this a nuclear option, when all it is is the question of whether it is a majority vote to give advice and consent or to dissent on a particular judicial nomination. It is my view, in the even the minority party continues with the approach of obstructing the opportunity of a nominee to have fair consideration, then this constitutional option must be utilized. We should not be timid. We should not cower. I believe the obstructionist approaches are preventing me from exercising my duty and responsibility to the people of the Commonwealth of Virginia to advise and consent on these judicial nominations. I hope my colleagues will not continue this obstructionist approach. In the even they do, then we have to use the constitutional option. I do not think it is too much to ask Senators to get off their haunches and show the backbone or spine to vote yes or no, but vote, and then explain to their constituents why they voted the way they did on any particular man or woman who has been nominated to a particular judicial position.

I am hopeful we do not have to use it, but if we do, go for it. Do not cower. Do not be timid. The people, as my colleague from Georgia said, all across this country, whether they are down in Cajun country in Louisiana, whether the are down in Florida, whether they are in the Black Hills of South Dakota, or whether they are in the Shenandoah Valley of Virginia, expect action on judges. As much as people care about less taxation and energy security for this country and wanting us to be leaders in innovation, they really expect the Senate to act on judges. It is a values issue. It is a good government issue. It is a responsibility-in-governing issue that needs to be addressed.

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Santorum Answers Minority Leaders on Judges, Arrogance

Washington, D.C.-Senator Rick Santorum (R-PA), chairman of the Senate Republican Conference, today issued the following statement in response to charges of "arrogance of power" in the judicial nominations debate made at a press conference held by the Minority Leaders of the House and Senate.

"The Democratic Leadership is threatening to shut down the Senate if they don't get their way - that is true arrogance. Democratic Senator Ben Nelson is calling on his leadership to end the partisan filibusters and compromise to allow up-or-down votes. Apparently, a

number of Democrats are not comfortable with their leadership's extreme political tactic of permanently blocking votes on these nominees.

"Furthermore, it is hard for me to understand the Minority Leaders' argument that permanently blocking up-or-down votes somehow helps protect the right of the minority to free speech. I will remind them that the Senate devoted more than 150 hours to debating judicial nominations in the 108th Congress - more than any previous Congress. The truth is, this debate isn't about free speech, it's about the right and duty to vote."

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CORNYN CALLS FOR AN END TO 'PARTISAN POWER GRAB'

Nominees deserve up-or-down vote, not a minority threatening to shut down the government if they don't get their way

U.S. Sen. John Cornyn, a member of the Senate Judiciary Committee, made the following statement Wednesday regarding the Minority Leader's press conference, and the "partisan power grab" by Senate Democrats who boast about their unprecedented obstruction [***see note at end of this page] *of the President's judicial nominees:*

"This partisan power grab by Senate Democrats in the judicial nominations process has gone too far. Four years is too long, and it's well past time for the President's nominees to be allowed an up-or-down vote. But instead of compromise or debate, a partisan minority of the Senate is now arguing that unless they get their way, unless they are allowed to continue altering the rules to require a 60 percent standard for confirmation, they will shut down the United States Senate. That would be wrong and extreme. Now *that* would truly be a 'nuclear option.'

"We have the duty to find a reasonable solution to this problem – and then continue with the rest of the people's business. The Senate should hold a simple up-or-down vote on the President's nominees. The last thing we should allow is for a partisan minority of the Senate to shut down the government just because a majority of Senators exercised their constitutional authority to confirm fair judges through a fair process."

***In a fund-raising electronic newsletter (Nov. 2003) to potential donors, the then-chairman of the DSCC, Sen. Jon Corzine (D-N.J.), acknowledged – indeed, he boasted – that the current blockade of judicial nominees is 'unprecedented.'

"The following paragraph from the solicitation says it all:

'But the Administration has got a big problem: Senate Democrats. Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.'

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Senator Thune on Fox and Friends, 4/13/05

Question: ok. your safe you're hopeful. but a lot of people are worried that, you know, once again, the democrats and the republicans are going to be at logger heads and right now there's kind of an impasse over whether or not this nuclear option thing with the filibuster might go through. I know you've only been on the job for 100 days, but does it feel like you're getting cooperation from across the aisle?

THUNE: You know, we have to date. I think we've seen some good cooperation on a couple of these early pieces of legislation. But what really threatens -- what really threatens to derail all of that is this issue of judicial nominees. The people in this country want to see the Senate work and function effectively. The Democrats have threatened to shut the place down if they don't get their way on judicial nominees. What we're simply saying is the Constitution requires and it's been the Senate's role for the past 200 years to confirm or vote on at least vote up and down on judicial nominees. The Democrats have in the last session of Congress, decided to filibuster judicial nominees. That is completely without precedent. 200 years of tradition, history and precedents here in the United States senate means that we need to continue to give these judges an up and down vote. These are judges who will have clear majorities in the Senate … they are going to be blocked by the Democrats. All we are simply doing is trying to restore what has been the tradition and precedent and history of the Senate for over 200 years and make sure that they get voted on.